90-1469

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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WILLIAM H. HERNSTADT and JUDITH HERNSTADT,

Petitioners,

v.

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1987

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC., **

Appellant/Cross-Appellee, **

vs. CASE NO. 85-589 **

WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife, **

Appellees/Cross-Appellants. **

Opinion filed August 18, 1987.

An Appeal from the Circuit Court for Dade County, Phillip W. Knight, Judge.

Carlton, Fields, Ward, Emmanuel, Smith & Cutler and Alan C. Sundberg and Sylvia Walbolt (Tallahassee), for Appellant/Cross-Appellee.

Hall, O'Brien and Cohen and Richard F. O'Brien, III, for Appellee/Cross-Appellant.

Before HUBBART, NESBITT and FERGUSON, JJ.

PER CURIAM.

Brickell Bay Condominium Association, Inc. appeals from a judgment in favor of the Hernstadts, unit owners, in a dispute over ownership of a roof structure in a condominium building.

The Hernstadts converted a structure located on the roof of the building, adjacent to their unit, into a bathroom and bedroom to be used for servant quarters as part of their unit. The structure, which was not included in the original plans, was added during the construction of the building for the sole purpose of housing air conditioning equipment for a restaurant and club located in the unit now owned by the Hernstadts.[1] Conversion of the structure was commenced by the Hernstadts

---

[1] Ninety percent of the structure is situated over common elements of the building and 10 percent is located over the Hernstadt's unit.

without obtaining the Association's prior written approval as is required by the Declaration of Condominium.

It was not disputed that the Association gave the Hernstadts formal notice, before they closed on the purchase of their units, that the air conditioning room was not part of their unit. It is also agreed that the Association did not give approval to the Hernstadts' proposed renovation of the roof structure. In fact, the Hernstadts' proposed plan was specifically disapproved by the Association's engineers before the renovations began. After renovations of the structure had commenced, and in connection with a lawsuit filed by the Hernstadts regarding a leaky roof, the Association, through its attorney, advised the Hernstadts:

> [T]he structure over [the Hernstadts' unit] is the property of the association and your client is trespassing.

The renovations continued, in conjunction with renovations within the Hernstadts' own unit, for some nine months. During that time, the parties were still attempting to resolve the dispute over the Hernstadts' right to use the structure. Two months after the work was completed the Association demanded that the Hernstadts discontinue use of the air conditioning room unless 75 percent of the owners gave the required consent.

On a separate point the facts show that the Association refused to amend the Declaration of Condominium to provide for the completed division of the Hernstadts' Terrace Suite "A" into two smaller residential units. The Hernstadts complained that failure to amend the Declaration, as had been agreed to, prevented a sale of one of the units to a prospective purchaser. It was uncontroverted, however, that the Association had repeatedly

offered to amend the Declaration to reflect the division of the Hernstadts' unit into two apartments so long as the amendment did not include the disputed roof top structure. The Hernstadts refused to execute an amendment which did not recognize the air conditioning room as additional living space for their exclusive use and occupancy. Instead, they submitted to the Association a proposed amendment which provided:

> The Structure [the rooftop room] shall constitute a Limited Common Element and the HERNSTADTS, their successors and assigns, shall be entitled to the exclusive use and possession of the Structure....

A fourth proposed amendment submitted by the Hernstadts, which referred only to the Terrace Suite, was accompanied by a reservation of rights agreement as to the rooftop structure. The Association declined to execute the Hernstadts' proposed amendments or the reservation of rights agreement.

Adopting the arguments advanced by the Hernstadts, the trial court entered a Final Judgment ordering

> 1. The Hernstadts be and are hereby awarded the exclusive use and occupancy of the structure over the Terrace A...which they have converted to be an integral part of the living area...and the Association is estopped to deny them such exclusive use and occupancy.
>
> 3. The Hernstadts be and are hereby awarded damages against the Association attributable to the loss of the contract for sale of the smaller apartment made out-of Terrace A....

The Hernstadts contend that the failure of the Association to at least attempt affirmatively to prevent the renovations justifies application of waiver and estoppel principles. We disagree.

A Declaration of Condominium is a requirement of section 718.303(1), Florida Statutes (1985), for the governance of relationships between condominium unit owners

and the condominium association. The Declaration of Condominium, observed the court in Pepe v. Whispering Sands Condominium Association, 351 So.2d 755 (Fla. 2d DCA 1977),

> is more than a mere contract spelling out mutual rights and obligations of the parties thereto--it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property.

A Declaration of Condominium is strictly construed to preclude any use not explicitly authorized by the Declaration. Fountains of Palm Beach Condo., Inc. No. 5 v. Farkas, 355 So.2d 163 (Fla. 4th DCA 1978).

A starting point in this review of the law of waiver and estoppel is the authorities which hold that the estoppel principle generally has no application to transactions which are forbidden by statute or ordinance or which are contrary to public policy. State ex rel. Schwartz v. City of Hialeah, 156 So.2d

675 (Fla. 3d DCA 1963); Confederation Life Ass'n v. Conte, 254 So.2d 45 (Fla. 3d DCA 1971), quashed on other grounds, 272 So.2d 130, cert. denied, 410 U.S. 959, 35 L.Ed.2d 693, 93 S.Ct. 1422. Estoppel is an equitable doctrine which is applied only where to refuse its application would be virtually to sanction the perpetration of a fraud. McAllister Enterprise Inc. v. McAllister Hotel, Inc., 219 So.2d 114 (Fla. 3d DCA 1969).

The courts of this state have uniformly refused to apply estoppel principles to permit alterations of condominium property without written permission of the Association. Schmeck v. Sea Oats Condo. Ass'n, Inc., 441 So.2d 1092 (Fla. 5th DCA 1983); Ladner v. Plaza Del Prado Condominium Ass'n., 423 So.2d 927 (Fla. 3d 1982); Chattel Shipping and Investment, Inc. v. Brickell Place Condominium Ass'n, Inc., 481 So.2d 29 (Fla. 3d DCA 1985); Constellation

Condominium Ass'n. v. Harrington, 467 So.2d 378 (Fla. 2d DCA 1985). In Fountains of Palm Beach Condominium, Inc. No. 5 v. Farkas, supra, the court rejected the same argument presented here that the failure of the Association to object to the unit owner's intent to alter the common elements should operate as an estoppel or waiver. Instead it held:

> Neither...the noncommittal, though apparently rather favorable, attitude of the management firm [could] be said to have justified any belief by the owner that she could safely ignore the requirement of the Declaration of Condominium that she obtain the prior written consent of both management and the association before altering the common elements.

355 So.2d at 164.

The cases relied upon by the appellee are not applicable as they applied estoppel principles where the unit owner had relied upon affirmative acts of the Association

permitting alterations to the common elements or where the association's previous non-enforcement of its rules had led other unit owners to act in reliance on a continuation of that policy. Fifty-Six Sixty Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979); Fifty-Six Sixty Collins Ave. Condominium v. Dawson, 354 So.2d 432 (Fla. 3d DCA 1978); Plaza Del Prado Condominium Association v. Richman, 345 So.2d 851 (Fla. 3d DCA 1977).

The Declaration of Condominium in this case required written approval by the Association for an alteration to the common elements. The Hernstadts were aware of the requirement before they started renovating the roof structure. Under Florida law no estoppel by silence can arise unless the party asserting the estoppel claim is ignorant of the truth. Ennis v. Warm Mineral Springs, Inc., 203 So.2d 514, 520 (Fla. 2d DCA 1967),

cert. denied, 210 So.2d 870 (Fla. 1968). There are no factors presented which justify application of waiver and estoppel principles.

The evidence does not support the Hernstadts' contention that the Association's refusal to amend the Declaration of Condominium, to reflect a division of their unit into two smaller units, caused a failure of the sale of one of their units. It was the Hernstadts' refusal to execute an agreement pertaining only to the subdivision of Terrace Suite A which frustrated the sale. The Association had no obligation to enter into any agreements regarding the disputed roof structure.

An established principle of law is that a party's good faith cooperation is an implied condition precedent to performance of a contract. Fernandez v. Vasquez, 397 So.2d 1171, 1174 (Fla. 3d DCA 1981). Cooperation of

the Hernstadts was a prerequisite to an amendment of the Declaration of Condominium to reflect the subdivision of their unit. One who prevents the performance of a contractual condition precedent cannot avail himself of his own wrong by claiming damages owing to the other party's failure to perform as promised. Knowles v. Henderson, 156 Fla. 31, 22 So.2d 384, 386 (Fla. 1945). Any damages suffered by the Hernstadts from a failed sale of one of their units was not the fault of the Association.

Four of the five points raised by cross-appeal are mooted by the rulings on the main appeal. The remaining point, whether the court committed error in failing to award damages to the Hernstadts for roof leaks, window leaks and water damage, is without merit. The Hernstadts' own witnesses could not say that the damages were not the same as

those for which recovery was obtained in an earlier lawsuit.

The judgment for the Hernstadts is reversed and the cause is remanded with instructions to enter judgment for the Association; the cross-appeal is affirmed.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1987

WEDNESDAY, OCTOBER 7, 1987

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC., **

Appellant/Cross-Appellee, **

vs. CASE NO. 85-589 **

WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife, **

Appellees/Cross-Appellants. **

Upon consideration, appellees/cross-appellants' motion for rehearing and clarification in conjunction with motion for rehearing en banc is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of Appeal, Third District

By /s/Evelyn A. Hillman
Deputy Clerk

cc: Alan C. Sunberg
Richard F. O'Brien, III

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1990

WILLIAM HERNSTADT and JUDITH HERNSTADT, **

Appellants, **

vs. CASE NO. 88-2583 **

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC., **

Appellee. **

Opinion filed April 3, 1990.

An Appeal from the Circuit Court for Dade County, Robert H. Newman, Judge.

Hall, Poller & O'Brien and Henry Mark Holzer, for Appellants.

Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik and Paul Siegel and Steven I. Weissman, for appellee.

Before BASKIN, COPE and LEVY, JJ.

PER CURIAM.

Appellants William and Judith Hernstadt appeal a final judgment entered in favor of Brickell Bay Club Condominium Association, Inc. The final judgment was entered after remand from an earlier appeal, Brickell Bay Club Condominium Association, Inc. v. Hernstadt, 512 So.2d 994 (Fla. 3d DCA 1987), review denied, 520 So.2d 584 (Fla. 1988). The Hernstadts contend that the trial court deviated from the mandate in the earlier appeal. We disagree and affirm.

The facts of the prior appeal are set forth in the earlier opinion and will not be repeated in detail here. In essence the Hernstadts converted a structure located on the roof of their condominium unit so that it could be used as part of their unit. The Association contended that the renovation had occurred without required approvals and

directed the Hernstadts to cease using the renovated area. The Hernstadts initiated a lawsuit which requested a declaratory judgment and other relief. The Association counterclaimed for a mandatory injunction requiring the Hernstadts to cease and desist from using the roof structure, damages, and other relief. The trial court ruled for the Hernstadts, ruling that the doctrine of estoppel prevented enforcement of certain provisions of the Declaration of Condominium. The trial court thus granted the declaratory judgment and also awarded damages to the Hernstadts, subject to setoffs in favor of the association for certain assessments pertaining to the condominium unit. The Association appealed the final judgment, and the Hernstadts cross-appealed several issues pertaining to the declaratory decree and damage awards.

Our court ruled that "[t]he judgment for the Hernstadts is reversed and the cause is remanded with instructions to enter judgment for the Association; the cross-appeal is affirmed." 512 So.2d at 997. On remand the trial court directed the Hernstadts to cease and desist from using the roof structure, reserved jurisdiction for a later award of damages, and again entered an award for unpaid assessments.

On this appeal, the Hernstadts contend that the direction "to enter judgment for the Association" only meant to enter judgment as to the Hernstadts' declaratory Judgment action, but not to enter judgment in favor of the Association on the counterclaim. That contention is without merit. This entire matter was the subject of a lengthy bench trial at the conclusion of which the trial judge granted most of the relief requested by

the Hernstadts, and denied most of the relief requested by the Association. The principal issue on appeal was whether the doctrines of waiver and estoppel operated to prevent the Association from enforcing the terms of the Declaration of Condominium. The phrase "enter judgment for the Association" was correctly interpreted by the trial court and its judgment is consistent with the mandate. See City of Miami Beach v. Arthree, 300 So.2d 65 (Fla. 3d DCA 1973).

The Hernstadts also contend that the proceedings on remand deprived them of due process of law. They assert that they had neither notice nor an opportunity to be heard with respect to, the relief granted the Association. The Hernstadts argue that they are entitled to a new trial on the counterclaim. We disagree. As already stated, the original trial judge conducted a bench

trial on the merits of the Hernstadts' and Association's claims. On direct appeal, our court determined that the defenses of waiver and estoppel were not available to the Hernstadts, and that, on the record as made, the Association was entitled to judgment. The new final judgment entered after remand is consistent with the relief requested by the Association in its counterclaim and is entirely consistent with both the opinion and mandate of this court. The Association filed a written motion for entry of final judgment on the mandate, which gave fair notice of the Association's position. The trial court heard argument of counsel and entered that judgment now under review. The procedure followed conforms to the requirements of the due process clause.

Affirmed.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1990

MONDAY, JUNE 4, 1990

WILLIAM HERNSTADT and JUDITH HERNSTADT,	**
	**
Appellants,	**
vs. CASE NO. 88-2583	**
BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,	**
Appellee.	**

Upon consideration, appellants' motion for rehearing and for clarification and motion for rehearing en banc is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By /s/Evelyn A. Hillman
Deputy Clerk

cc: Jeffrey D. Rubinstein
Richard F. O'Brien, III
Alan Sunberg
Paul A, Lewis

SUPREME COURT OF FLORIDA

FRIDAY, NOVEMBER 16, 1990

WILLIAM HERNSTADT, et al.,	*
	*
Petitioner,	*CASE NO. 76,301
	*
v.	*District Court
	*of Appeal, 3rd
	*District -
	*No. 88-2583
BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,	*
	*
	*
Respondent.	*
	*

****

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P.

9.330(d).

MCDONALD, Acting C.J., EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur

Respondent's Motion for Attorney Fees is granted and said attorney is allowed a fee of one thousand dollars ($1,000.00) for services in this Court, said sum to be paid to said attorney Petitioners after final disposition of this cause.

A True Copy

TEST:

Sid J. White
Clerk,
Supreme Court

BH
CC:Hon. Louis J. Spallone, Clerk
Hon. Robert H. Newman, Judge
Richard F. O'Brien, Esquire
Paul A. Louis, Esquire
Steven I. Weissman, Esquire
Jeffrey Rubinstein, Esquire

HENRY MARK HOLZER, ESQ.
and
HALL, O'BRIEN AND SACK, P.A.

By:_____
GARY B. SACK, ESQ.
1428 Brickell Avenue
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Counsel for
Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this ____ day of March, 1991 to Paul A. Louis, Esq., Sinclair, Louis, Segal, et al., 1125 Alfred I. Dupont Building, 169 E. Flagler Street, Miami, FL 33131 and Jeffrey D. Rubinstein, Esq., Sun Bank Building, Suite 708, 777 Brickell Avenue, Miami, FL 33131.

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4017B151.APP